

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2009 MTWCC 32

WCC No. 2009-2316

**DONNA BURKE, as surviving widow of
JAMES F. BURKE, deceased,**

Petitioner

vs.

ROSEBURG FOREST PRODUCTS CO.

Respondent/Insurer.

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

Summary: Respondent moved to dismiss Petitioner's petition based on Petitioner's failure to complete the mediation process before filing her Petition for Hearing as required by § 39-71-2408(1), MCA and § 39-71-2905, MCA. Although the mediator had not issued her report prior to the filing of Petitioner's petition, Petitioner argued that the Court should nevertheless exercise jurisdiction because the purposes of mediation had been served.

Held: Respondent's motion is granted. The Court lacked jurisdiction over this matter prior to the completion of the statutorily-mandated mediation process. Although the Court might conceivably exercise jurisdiction now that the statutorily-mandated mediation process had been completed, albeit two months after the petition was filed, the case would be moving forward under a cloud of uncertainty as to whether jurisdiction could be retroactively restored. Although dismissing the petition and restarting the process is inconvenient at this juncture, it is much more impractical to proceed to trial with the specter of restarting the process after an appeal. The more prudent course of action is to dismiss the petition without prejudice.

¶ 1 Respondent Roseburg Forest Products Company (Roseburg) moved to dismiss Petitioner Donna Burke's (Burke) petition based on Burke's failure to complete the mediation process before filing her Petition for Hearing as required by § 39-71-2408(1), MCA and § 39-71-2905, MCA. For the reasons discussed below, Roseburg's motion is granted.

Factual Background

¶ 2 The department mediation of this case occurred on January 20, 2009. The parties did not resolve their dispute. Neither party requested a report from the mediator and the mediator did not issue a report.

¶ 3 Burke filed her Petition for Hearing on July 2, 2009. In her petition, Burke stated: “A mediation has taken place.”¹

¶ 4 Roseburg filed its Response to Petition for Hearing on July 27, 2009. In its Response, Roseburg stated: “The mediation procedures set forth in the Workers’ Compensation Act have been satisfied by the parties.”²

¶ 5 Roseburg moved to dismiss the petition on August 14, 2009, asserting a lack of jurisdiction in the Workers’ Compensation Court because mediation had not been completed.

¶ 6 After Roseburg filed its motion to dismiss, Burke’s counsel contacted the mediator and attempted to obtain a report. Burke advised the Court on August 28, 2009, that she had received the mediator’s report.

¶ 7 The Court held a conference call with counsel for both parties on September 3, 2009. During this conference, I inquired of both counsel if either party had notified the mediator pursuant to § 39-71-2411(7), MCA, as to whether the mediator’s recommendation had been accepted. Both counsel confirmed that they had not yet notified the mediator regarding acceptance or rejection of the recommendation; however, Burke’s counsel advised that he sent a notice to the mediator during the conference call.

Discussion

¶ 8 In *Preston v. Transportation Insurance Co.*,³ the Montana Supreme Court held:

[T]he Workers’ Compensation Court does not have jurisdiction during the pendency of a statutorily-mandated mediation, given that a claimant may

¹ Petition for Hearing, ¶ 20.

² Response to Petition for Hearing at 2.

³ *Preston v. Transp. Ins. Co.*, 2004 MT 339, 324 Mont. 225, 102 P.3d 527.

only petition the Workers' Compensation Court "after satisfying dispute resolution requirements otherwise provided" in the Workers' Compensation Act – such as mandatory mediation.⁴

In *Preston*, the Montana Supreme Court considered the twenty-five-day notification period after the issuance of the mediation report to be part of the "statutorily-mandated mediation process."⁵

¶ 9 Applying *Preston* to the facts of the present case, this Court clearly lacked jurisdiction over this matter until Burke's counsel notified the mediator of her acceptance or rejection of the mediator's recommendation. Burke argues that the Court should nevertheless exercise jurisdiction over this case because "the purpose of the mediation has been served" and "[i]t is unclear what purpose a mediation report would serve at this point."⁶ Although Burke's argument may be well-taken from a practical standpoint, practicality cannot operate as a source of jurisdiction.⁷

¶ 10 I noted to counsel during the conference call that I was troubled by the fact that this matter had proceeded towards trial for six weeks before Roseburg raised the jurisdictional issue. I further questioned whether, notwithstanding the lack of jurisdiction at the outset, the Court might properly exercise jurisdiction in any event, now that the statutorily-mandated mediation process has been completed – albeit two months after the petition was filed. Ultimately I determined that if the Court were to proceed in this fashion, this case would be moving forward under a cloud of uncertainty as to whether the jurisdiction that had been lacking from the inception of this case and through the following two months, could now be retroactively restored. As impractical as it may seem to dismiss the petition and restart the process at this juncture, it is much more impractical to proceed to trial with the specter of restarting the process after an appeal.

ORDER

¶ 11 Roseburg's motion to dismiss is **GRANTED**.

¶ 12 Burke's Petition for Hearing is dismissed without prejudice.

⁴ *Preston*, ¶ 36.

⁵ *Preston*, ¶ 35.

⁶ Petitioner's Response to Respondent/Insurer's Motion to Dismiss at 4.

⁷ See *Thompson v. State of Montana*, 2007 MT 185, ¶ 34, 338 Mont. 511, 167 P.3d 867.

¶ 13 Pursuant to ARM 24.5.348(2), this Order is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED in Helena, Montana, this 14th day of September, 2009.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Steven S. Carey
Kelly M. Wills
Submitted: September 3, 2009